UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Amare Gurmu Solomon,

Debtor.

Bky. No. 12-33993
(Chapter 7)

Amare Gurmu Solomon,

Plaintiff,

vs.

Student Loan Finance Corporation, Education Loans Incorporated, and GOAL Funding II, Inc.,

Defendants.

Adv. No. 12-03276

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Defendants Student Loan Finance Corporation, Education Loans Incorporated, and GOAL Funding II, Inc., respectfully submit this memorandum in opposition to the motion for summary judgment brought by Plaintiff/Debtor Amare Gurmu Solomon ("Solomon"). Solomon advances two arguments in support of his motion. First he argues that the legislative history supports a finding that 11 U.S.C. § 523(a)(8) does not apply to the three loans he cosigned. Second, Solomon argues that the notes he signed were not educational loans. These arguments fail for a number of reasons. First, the plain language of the statute defeats Solomon's argument and resort to the legislative history is neither necessary nor appropriate. Second, even if it were necessary to review the legislative history, Solomon's reading of the legislative history is narrow and overlooks the purpose of the student loan program. Third, courts have routinely rejected that promissory notes like the one Solomon signed are not educational loans. Accordingly, Defendants respectfully request that the Court deny Solomon's motion for summary judgment.

BACKGROUND

The relevant facts relating to Solomon's motion are set forth in the Stipulated Statement of Facts ("Stip.") filed with the Court. *See* Dkt Nos. 22, 26. During the early 2000's, Samuel Bankole applied for three student loans from Academic Funding Group ("AFG"). (Stip. ¶ 1.) In connection with each loan, Bankole submitted an "Application and Promissory Note." (*Id.* ¶ 2, Exs A-C). Each application listed the school receiving the loan as the University of Minnesota/Twin Cities. (*Id.*) Solomon is listed as the cosigner of each note. (Stip. ¶ 6; Exs A-C.)

The first page of each application contains a promissory note. (*Id.*) On the reverse side of each application are the promissory notes' terms and conditions. (Stip. ¶ 7, Exs A-C.) The terms and conditions state that the "proceeds of this loan will be used only for educational expenses at the school that has certified the application to which this Promissory Note applies." (*Id.*) The terms and conditions also require the borrower to certify that "the proceeds for this loan will be used for educational expenses at the school named for the loan period stated on the Application." (Stip. ¶ 8; Exs A-C.)

The terms and conditions also include a section entitled "Notice to Cosigner(s)" which states that a cosigner to the loan is "being asked to guarantee this debt." (Stip. ¶ 9; Exs A-C.) The section informs the cosigner that they "may have to pay the full amount of this debt if the Borrower does not pay" as well as "late charges and collections costs which *increase this amount*." (*Id*.)

Bankole defaulted on the loans. (Stip. ¶ 10.) Solomon was informed that Bankole defaulted. (Stip. ¶ 11.) As part of his Chapter 7 bankruptcy, Solomon commenced this adversary proceeding seeking a determination as to whether the promissory notes are dischargeable. (*See* Amended Adversary Complaint ("Compl.") ¶ 1.)

ARGUMENT

I. STANDARD OF REVIEW.

Summary judgment is appropriate where there is no disputed question of material fact, leaving only a question of law to resolve a dispute. *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986); Fed. R. Civ. P. 56(c) as incorporated by Fed. R. Bankr.P. 7056 (allowing grant of summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law"). Here, the question of law before the court is whether the promissory notes contained in the three promissory notes are dischargeable. Since the promissory notes are not dischargeable, Solomon is not entitled to summary judgment.

II. THE PLAIN LANGUAGE OF THE STATUTE APPLIES TO SOLOMON.

Solomon argues that as a co-borrower, he should be allowed to discharge the student loans he guaranteed. Pltf's Mem. at 4. 11 U.S.C. § 523(a)(8) provides that:

> A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—
>
> . . .
>
> (8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for—
>
> > (A)(i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or
> >
> > (ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or
> >
> > (B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986,[1] incurred by a debtor who is an individual[.]

The sole question presented here is whether section 523(a)(8) applies to education loan obligors other than students receiving the education funded by the loans. The statutory language draws no distinction between obligors on an educational loan. The plain meaning of the statute strongly suggests that educational loans are nondischargeable whether the named borrower is a student or not. Indeed, the exceptions to the nondischargeability of student loans are "carefully delineated in subsections (A) and (B)." *Barth v. Wisconsin Higher Education Corp. (In re Barth)*, 86 B.R. 146, 149 (Bankr. W.D. Wis. 1988). As the United States Court of Appeals for the Third Circuit noted, "Section 523(a)(8) does not refer to 'student debtor' but applies to limit discharge of any 'individual debtor' from 'any debt' for a covered educational loan." *Pelkowski v. Ohio Student Loan Commission (In re Pelkowski)*, 990 F.2d 737, 741 (3d Cir.1993). *See also Dull v. Ohio Student Loan Commission (In re Dull)*, 144 B.R. 370, 372 (Bankr. N.D.

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[1] "The term 'qualified education loan' means any indebtedness incurred by the taxpayer solely to pay qualified higher education expenses . . . ." 26 U.S.C.A. § 221 (d)(1).

Ohio 1992) ("The plain language of § 523(a)(8) does not limit applicability to educational loans on which the student is the obligor"); *Education Resources Institute, Inc. v. Wilcon (In re Wilcon),* 143 B.R. 4, 5 (D. Mass. 1992) ("[I]t is erroneous to limit the provisions of 11 U.S.C. § 523(a)(8) to loans made only to students"); *Hawkins v. Chase Manhattan Bank (In re Hawkins),* 139 B.R. 651, 653 (Bankr. N.D. Ohio 1991); *Hudak v. Union National Bank of Pittsburgh (In re Hudak),* 113 B.R. 923, 924 (Bankr. W.D. Pa. 1990).

While Solomon argues that the statutory language goes beyond what Congress intended, the "mere fact that the statutory language extends the effect of the statute beyond the primary goal enunciated by Congress is not a valid reason not to give the statutory language full effect". *Education Resources Institute, Inc. v. Hammarstrom (In re Hammarstrom),* 95 B.R. 160, 164 (Bankr. N.D. Cal. 1989). The Court should not assume the role of the legislature by deviating from the words of the statute and creating new law. Long ago, the Supreme Court warned against this form of judicial activism in *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930). Courts have stated clearly the necessary element for allowing judges to deviate from a statute's plain meaning. *See In re Hammarstrom*, 95 B.R. at 162 ("A court may not decline to follow the plain meaning of the statute merely because such language goes beyond Congress' primary stated goal in enacting that statute"). "To give statutory language other than its plain meaning, a court must find that a literal meaning of the statute would actively frustrate the purpose of Congress as revealed in unambiguous legislative history." *Id*. at 162–63. Solomon makes no argument that finding his debt nondischargeable would actively frustrate the purpose of Congress. Presumably this is because there is no reason why holding Solomon accountable for the promissory notes he signed would frustrate the purpose of 11 U.S.C. § 523(a)(8). Accordingly, the Court can only look to the words of the statute and interpret them according to their plain meaning. Interpreting the plain language of the statute mandates a denial of Solomon's motion.

III. SOLOMON MISAPPREHENDS THE LEGISLATIVE HISTORY.

In discussing the legislative history of Section 523(a)(8), Solomon relies heavily on *Boylen, et. al. v. First Nat'l Bank of Akron, et. al. (In re Boylen)*, 29 B.R. 924 (Bankr. N.D. Ohio 1983). As an initial matter, *In re Boylen*, is significantly distinguishable from this case in that it was decided on grounds of "undue hardship," which is a clearly delineated exception to Section 523(a)(8). Nevertheless, it is true that it was reasoned in *Boylen* that despite the clear language of Section 523(a)(8), which speaks only in terms of the type of loan, not the status of the borrower, the policy behind nondischargeability was to prevent only students from discharging their loans upon graduation. *Id*. at 926. In fact, the *Boylen* court admitted that the statute's plain language was not limited to student debtors alone. *Id*. at 927. Nevertheless, the *Boylen* court found that the congressional intent and legislative history of 11 U.S.C. § 523(a)(8) revealed an intent to curb abuse of educational loan programs by students who sought a discharge of school loan debts immediately after graduation. *Id*. The court reasoned that applying the non-limiting language to non-student debtors would frustrate this specific intent: "Congress had no intention to except a co-maker's liability on a student loan debt from discharge" since it was "utterly contrary to the fresh start" purposes envisioned by the Bankruptcy Code. *Id*.

Solomon reinforces this position by citing decisions consistent with *Boylen: Zobel v. Iowa College Aid Comm'n (In re Zobel)*, 80 B.R. 95 (Bankr. N.D. Iowa. 1985); *Washington v. Virginia State Educ. Assistance Auth. (In re Washington)*, 41 B.R. 211 (Bankr. E.D. Va. 1984); *Bartsch v. Wisconsin Higher Educ. Corp. (In re Meier)*, 85 B.R. 805, 807 (Bankr. W.D. Wis. 1986); *Kirkish v. Meritor Savings Bank (In re Kirkish)*, 144 B.R. 367 (Bankr. W.D. Mich. 1992). As Defendants noted in their memorandum in support of their motion for summary judgment, no case in the 21st Century has adopted this reasoning. In fact, the *Boylen* court itself rejected this line of authority when it ruled in *In re Dull*, 144 B.R. 370, 372 (Bankr. N.D. Ohio 1992), that the language of Section 523(a)(8) was "all inclusive" and applicable to all educational loan debt whether or not the obligor is a student and whether or not benefits were received from the loans.

The Third Circuit engaged in an extensive discussion of the legislative history when it declined to adopt *Boylen* in *In re Pelkowski*. The *Pelkowski* court noted that it is undisputed that section 523(a)(8) was enacted in response to the belief that students were taking advantage of the loan program. 990 F.2d at 742. In the 1970's, there was concern by legislators and the public about the perceived rise in bankruptcy filings by students on the brink of lucrative careers. *Id*. (*citing* H.R.Doc. No. 137, 93d Cong., 1st Sess., Pts. I and II (1973), reprinted in App. 2 Collier on Bankruptcy § I, at 176–77 (Lawrence P. King, et al., eds., 15th ed. 1992)).

As part of the contemplated Education Amendments of 1976, the House Education and Labor Committee proposed to except educational loan debt from discharge in bankruptcy unless the debtor could show undue hardship or that the loan came due more than five years before the bankruptcy filing. *Id*. (*citing H*.R. Rep. No. 595, at 132, reprinted in 1978 U.S.C.C.A.N. at 6093). Although the nondischargeability provision was enacted as an amendment to the Higher Education Act of 1965, it was reconsidered by Congress shortly thereafter. *Id*. The House Judiciary Committee and its Subcommittee on Civil and Constitutional Rights opposed treating educational loan debt and student debtors differently than other debt and other debtors. *Id*. (citing H.R. Rep. No. 595, at 132, reprinted in 1978 U.S.C.C.A.N. at 6093).

During consideration of H.R. 8200 by the full House, which eventually culminated in the Bankruptcy Reform Act of 1978, Representative Ertel of Pennsylvania sponsored an amendment adding an educational loan nondischargeability provision, which quickly passed the House. *Id*. *(citing* 124 Cong. Rec. 1791, 1798 (1978)). This amendment was included in the Senate Bill, S. 2266, in substantially the same form. *Id*.(citing 124 Cong. Rec. 33,992, 33,998).

Neither the House nor the Senate engaged in much discussion of the nondischargeability provision. *Id* (*citing* S. Rep. No. 989, 95th Cong., 2d Sess. 79 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5865; 124 Cong. Rec. 28,284, 32,350–420, 34,143–45). On the Senate floor, the provisions of the bankruptcy bill were reviewed, including this section, but there was no discussion of its purpose. *Id*. (citing 124 Cong. Rec. 33,992, 33,998). Thus any indication of legislative intent—aside from the plain language of the statute—can only discerned from statements made by the House supporters of the provision. *Id*.

Representative Ertel stated that the purpose of the provision was

> to keep our student loan programs intact.... [T]he default rate in the student loan program has been escalating to tremendous proportions in the past year.... [T]he number of students going into bankruptcy—or ex-students—has increased....
> ....
> ... Without this amendment, we are discriminating against future students, because there will be no funds available for them to get an education.

Id. (citing 124 Cong. Rec. 1791–92).

Similarly Representative Mottl stated, "[t]here has been in the last few years a dramatic upswing in the number of student loan bankruptcies." *Id*. Representative Erlenborn criticized debtors who,

> not having assets to pledge, [are] pledg[ing their] future earning power. Having pledged that future earning power, if, shortly after graduation and before having an opportunity to get assets to repay the debt, [they] seek[ ] to discharge that obligation, I say that is tantamount to fraud.

Id. at 743 (citing 124 Cong. Rec. 1793). Representative Erlenborn also remarked that "nothing in the provision ... prohibits the discharge of the non-student loan debt." 124 Cong. Rec. 1793. However the Third Circuit found it "clear from the context that [Representative Erlenborn] was referring to other debts of student debtors. *In re Pelkowski*, 990 F.2d at 743. Moreover, even if the Representative Erlenborn's statement does refer to non-student debtors, the Supreme Court has advised that the remarks of a single legislator are not controlling in analyzing legislative history. *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.,* 447 U.S. 102, 118 (1980). The Third Circuit found it "considerably more significant" that the debate focused on the twin goals of rescuing the student loan program from "fiscal doom and preventing abuse of the bankruptcy process by undeserving debtors." *In re Pelkowski*, 990 F.2d at 743 (citations omitted).

The Third Circuit concluded that Congress enacted 11 U.S.C. § 523(a)(8) in an effort to prevent abuses in and protect the solvency of the educational loan programs. *Id.* Given that unpaid student loans will "adversely affect the financial integrity of the educational loan program equally whether the defaulting debtor is the student or the student's co-obligor," the Third Circuit found that the legislative history and intent supported the conclusion that section 523(a)(8) applies to a co-signer of a note for the educational expenses of another person. *Id*. at 743-744. The Third Circuit's analysis is the more persuasive. The Court should reject Solomon's characterization of the legislative history to the contrary.

IV. SOLOMON'S PROMISSORY NOTES ARE EDUCATIONAL LOANS.

Solomon argues that his guarantees do "not share the attributes of an educational loan." (Pltf's Mem. at 8.) Solomon, however, has already agreed that the loans he guaranteed are educational loans. In the additional agreements section on the back of the promissory notes, Solomon stated that he understood that the each of the loans was "an educational loan and may be made in part through a non-profit organization, including the school, and as such, may not be dischargeable in bankruptcy, except pursuant to 11 U.S. Code 523(a)8." *See* Stip., Exs. A-C.

Even if Solomon had not already agreed that the loans were educational loans, the Court should reject his argument. Courts have routinely rejected the reasoning on which Solomon relies. For example, Solomon cites *In re Kirkish* in support of his argument that his guarantees lack the attributes of an educational loan. However, Courts have routinely rejected the reasoning on which the *Kirkish* decision was based. *See e.g., Karben, et. al.*

v. ELSI, et. al (In re Karben), 201 B.R. 681, 682-83 (Bankr. S.D.N.Y. 1996) (rejecting *Krikish's* distinction between co-signer and student and noting this interpretation was based on a "prism of a narrow and questionable interpretation of the legislative history, assuming that rising student-debtor fraud alone prompted Congress to enact the statute."); *Norris, et. al. v. Norris (In re Norris)*, 239 B.R. 247, 253 (M.D. Ala. 1999) (rejecting *Kirkish* and similar cases on the grounds that they "erroneously gave the legislative history of § 523(a)(8) and the policy of the Bankruptcy Code precedence over the plain meaning of the statute" and that the there "is no evidence in the legislative history that Congress considered the status of the debtor to be a relevant consideration under § 523(a)(8)"); *Salter v. Educ. Res. Inst., Inc. (In re Salter)*, 207 B.R. 272, 275 (Bankr. M.D. Fla. 1997) (rejecting *Kirkish* and finding that "the proper focus should be on the kind of debt involved, rather than how the money was spent, or who was the borrower"); *In re Pelkowsk)*, 990 F.2d 737 (rejecting argument that statute only relates to student debtors and noting that the statute does not refer to student debtors but limits the discharge of any 'individual debtor' for 'any debt' for covered educational loans); *Mackey v. Nebraska Student Loan Program, Inc. (In re Mackey)*, 153 B.R. 34 (Bankr .N.D. Tex. 1993) (following *In re Pelkowski* and rejecting *In re Kirkish*); *Cownden v. Sallie Mae Servicing L.P. (In re Cownden)*, 08-11348, 2008 WL 6192256 (Bankr. N.D. Ohio Nov. 13, 2008) (rejecting *Kirkish* and agreeing "with the Third Circuit, and the majority of bankruptcy courts holding that educational loans are nondischargeable under 523(a)(8) even if the debtor is a non-student co-obligor"); *Palmer v. Student Loan Finance Corporation (In re Palmer)*, 153 B.R. 888 (Bankr. D.S.D. 1993).

Solomon's reliance on *In re Meier* is similarly misplaced. Indeed, a bankruptcy court in the very district where the *Meier* decision was issued declined to adopt its reasoning. In the case of *In re Barth*, the Court rejected *Meier*, finding that,

> [t]he language of section 523(a)(8) is broad in scope, and the exceptions to it are carefully delineated in subsections (A) and (B). This language must be regarded as the best evidence of Congressional intentions toward co-makers in the absence of any clearly expressed legislative intent to the contrary.

86 B.R. at 149.

As the Court noted in *Resources Inst., Inc. v. Selmonosky (In re Selmonosky)*, 93 B.R. 785 (Bankr. N.D. Ga. 1988), "Section 523(a)(8) is clear and unambiguous; debts for insured student loans are nondischargeable in bankruptcy. " "Absent a clearly expressed legislative intention to the contrary, the [statutory] language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm. v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Like the Court in *In re Barth*, this Court should reject Solomon's reading of § 523(a)(8) as applying only to student debtors.

Bawden v. First S. Fed. Sav. & Loan Ass'n (In re Bawden), 55 B.R. 459 (Bankr. M.D. Ala. 1985), another case on which Solomon relies for the proposition that co-signers excepts from discharge only debts of a loan beneficiary, has also been rejected by Bankruptcy Courts in the very district in which it originated. *See In re Norris*, 239 B.R. 247, 249 (M.D. Ala. 1999). As the *Norris* court noted, *In re Bawden* is "one of the relatively few cases to find that § 523(a)(8)" only applies to loan beneficiaries. The *Norris* court rejected this reasoning because it was "antithetical to the plain meaning of § 523(a)(8)." *Id*. at 253. Moreover, the court stated:

> There is no evidence in the legislative history that Congress considered the status of the debtor to be a relevant consideration under § 523(a)(8). In particular, the legislative history does not indicate that § 523(a)(8) only applies to student borrowers.

Id. The court noted that in passing § 523(a)(8), Congress was interested in "protecting the solvency and integrity of educational loan programs." *Id* (quoting 124 Cong. Rec. 1791 (1978) (remarks of Representative Ertel, a sponsor of § 523(a)(8)). Obviously a loan program is affected just as much when a cosigner or guarantor discharges a loan as when a student discharges a loan. *See id.* at 253.

Finally, Solomon cites *In re Washington* in support of his position that non-students may discharge their promissory notes on student loans. The sole reasoning in *In re Washington* was that it represented law in the Eastern District of Virginia. But this reasoning was not necessary to the decision. The debt at issue would have been dischargeable to the co-makers due to the fact that the original loan was due over five years prior to the filing of the petition. *In re Washington*, 41 B.R. at 215. As such, the Court should not rely on this obiter dicta. Solomon's motion for summary judgment should be denied.

CONCLUSION

Defendants agree that summary judgment is appropriate. However, summary judgment is proper in favor of Defendants, not Solomon. The plain language of the statute, its legislative history, and the much greater weight of persuasive authority suggest that Solomon is not entitled to judgment as a matter of law. For the reasons set forth above, as well as the reasons set forth in support of Defendants' motion for summary judgment, Defendants respectfully request that the Court deny Plaintiff's motion.

Dated: June 7, 2013

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Sunrise Credit Services, Inc.

Defendants.

Adv. No. 12-03276

CERTIFICATE OF SERVICE

Joyell M. Johnson of the City of Minneapolis, County of Hennepin, State of Minnesota, states that on June 7, 2013, she served the following document:

DEFENDANTS' MEMORANDUM
IN OPPOSITION TO
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electronically by Notice of Electronic Filing upon all parties who have requested service in these cases by filing the same via ECF with the Bankruptcy Court in the District of Minnesota.

/e/ Joyell M. Johnson
Joyell M. Johnson